Supreme Court, U.S.
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No. 93-72

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

HOWARD C. LINCOLN,
NEIL C. LEROY,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-3053 and 92-3073

UNITED STATES OF AMERICA,
Appellee,

v.

HOWARD C. LINCOLN, NEIL C. LEROY, and
WILLIAM P. HENRY

HOWARD C. LINCOLN,
Appellant in 92-3053
NEIL C. LEROY,
Appellant in 92-3073

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA
(D.C. Criminal No. 91-00010E)

Argued: September 22, 1992
Before: HUTCHINSON, ALITO and SEITZ,
Circuit Judges

(Opinion Filed: April 13, 1993)

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OPINION OF THE COURT

ALITO, Circuit Judge:

Following a jury trial in the United States District Court for the Western District of Pennsylvania, Howard C. Lincoln and Neil C. Leroy were

convicted under 18 U.S.C. § 371 of conspiracy to commit an offense against the United States by transporting stolen property in interstate commerce in violation of 18 U.S.C. § 2314. They now appeal, contending: 1) that the district court erred in refusing to suppress evidence that they claim was seized in violation of their Fourth Amendment rights; 2) that their conduct did not violate 18 U.S.C. § 371 because that provision applies to only those conspiracies in which the United States itself is in some concrete sense the target; 3) that the district court erred in calculating their sentences based in part on conduct underlying counts of the indictment on which they were acquitted; and 4) that the district court erred in calculating their sentences by refusing to grant a two-point reduction of

offense level for acceptance of responsibility.

Because the district court denied the defendants' suppression motions without making any findings of fact, we are unable, based on the present record, to review the district court's decision on that issue. Accordingly, we will remand for the district court to make pertinent factual findings. We find no merit in the defendants' remaining arguments.

I.

The evidence at trial showed that the defendants conspired to steal scrap copper from a General Electric (GE) plant in Erie, Pennsylvania, and to ship the copper across state lines. Lincoln Metal Processing, Inc., of which Lincoln was president and Leroy an employee, had

a contract with GE to purchase and remove scrap metal from the GE plant. The defendants plotted to have a co-conspirator at the plant fill "roll-offs"[1] with a considerable amount of copper and then add a top layer of steel concealing the copper. Under the defendants' scheme, GE would bill Lincoln Metal for these loads at the price per pound for scrap steel, which is substantially less than that for copper. These loads would then be hauled away; the steel would be removed; and the copper would be shipped out of state for resale at a considerable profit.

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[1] A "roll-off" is a large open-topped metal bin used to store and transport scrap. Once a roll-off is filled with scrap, it can be loaded onto a truck, moved, and off-loaded again as a unit. A roll-off can also be moved as a unit within a scrap yard by crane.

The conspiracy began to unravel on August 29, 1989, when Robert Fuchs, a truck driver employed by Lincoln Metal, became suspicious about a load that he had transported the day before from GE to Lincoln Metal's Chestner yard. He had left the roll-off outside the fence of the yard. After hearing some gossip by co-workers regarding the actual contents of the roll-off, he looked inside the roll-off himself before going home for the day. J.A. 423-25. Under the steel, he found that the roll-off was full of copper. We shall refer to this as the "Fuchs search."

After getting home, Fuchs called Harry Holmwood, a friend of his who was an Erie County deputy sheriff, and told him of his findings and suspicions. Holmwood in turn called Mark Watts, a county detective. The three of them met

sometime after 8:00 p.m. and drove together to the site of the roll-off. They confirmed that it contained copper and took some pieces of copper out. We shall refer to this as the "Watts search."

Watts then called the Lawrence Park Township police. Just before midnight, Watts, Fuchs, and Holmwood went to the Lawrence Park police station, where they spoke with Sergeants Olson and Middendorf. Following these conversations, Middendorf and Holmwood drove to the roll-off; they again confirmed again that it contained copper and removed some additional pieces of copper. We shall refer to this as the "Middendorf search."

Upon returning to the police station, Middendorf contacted David Seyboldt, a GE employee. Seyboldt came

to the station, examined a piece of the copper that Middendorf had removed from the roll-off, and stated that it was similar to the scrap that GE produced. On the following morning, August 30, Seyboldt went by himself to the roll-off, determined that it contained a great deal of copper of the sort that GE produced, and then informed the police. We shall refer to this as the "Seyboldt search. "

Middendorf then swore out an affidavit of probable cause and applied to a state district justice for a warrant to seize the roll-off and its contents. J.A. 24-27. The affidavit relied on the Fuchs search as showing the presence of copper in the roll-off and on information from Seyboldt as showing that the copper was GE's. The affidavit also relied on information

from both Fuchs and Seybold about Lincoln Metal's and GE's practices in handling copper scrap as showing that the copper in the roll-off had been taken from GE unlawfully.[2] The

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[2] The probable cause portion of the warrant, sworn to by Sergeant Middendorf, reads as follows (J.A. 24, 26):

At approx. 2350 hrs, 8/29/89, Sgt. Olson (Lawrence Park Twp Police Dept) received information from a truck driver (Robert W. Fuchs, 2507 Raspberry St, Erie) reporting that he believed he had hauled a load of stolen copper from the Erie General Electric Company. Fuchs reported that on 8/28/89 he received instructions from the Lincoln Metal Yard Superintendent (first name of Neil, last name unknown by Fuchs) his employer, to go to the General Electric Company/Building 13 and pick up a load of Silicon Steel. He was instructed to take the load to Joseph Chestner & Son's, 2245 E. 16th St, Erie and drop the load (metal bin) in the road, that he was not to dump the load because the pile was being moved. Fuchs said he normally dumped the loads at Chestner and thought the request was odd, but thought nothing more of the load. On 8/29/89 Fuchs returned to Chestners (in the office) and overheard two men talking about the load he had previously dropped. He overheard one man, whom he knows by the first name of

Bob (last name unknown) and who is the yard foreman, tell the other man that there is copper in the bottom of the load and that they would be using a magnet to removed the silicone steel which had been placed on top. After hearing this Fuchs said he walked out to the metal bin (that he had previously dropped off) moved some of the silicone steel aside and noticed what he believed was thousands of pounds of copper in the bottom of the bin.

Upon seeing this copper Fuchs recalled that his instructions had been to pick-up silicone steel (instructions from the Lincoln Yard Superintendent), that he had signed a materials pass and weigh slip at the General Electric for Silicone steel and no where was copper metal to be part of this load. Believing he was unknowingly involved in this theft, Fuchs contacted a friend, Harry Homewood who is an Erie County Deputy Sheriff, who in turn contacted the Erie County Detective Mark Watts (DA's office), who turned the incident over to Sgt. Olson.

At 0900 hrs, 8/30/89, Chief Krahe, Lawrence Park Township Police Dept, learned from David Seyboldt, Erie General Electric Salvage Manager that the copper removed by Fuchs was their property and that it was stolen. Seyboldt said he viewed the copper and recognized it as coming from the General Electric Plant. He said that under no circumstances would this copper have been loaded or stored in the metal bin, that copper is a regulated metal at General Electric and could not

affidavit made no explicit reference to the Watts, Middendorf, or Seyboldt searches or to the removal of any copper from the roll-off.

A state magistrate issued the requested warrant. Nothing in the record indicates that that magistrate was aware of any of the additional searches of the

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have been inadvertently removed from the plant.

Said copper and steel will be seized for the purpose to be used as evidence against person(s) who committed the crime of theft from the General Electric Co.

Information from Fuchs is believed based upon his full and complete cooperation with this Police Department.

Information from Sgt. Olson, Officer Holmwood and Det. Watts is believed based upon their involvement in this investigation and their professional status as Police Officers.

Fuchs testified at the trial consistently with the information attributed to him in the affidavit. He was not called to testify at the suppression hearing.

roll-off or seizures of copper not recited in the affidavit.

The roll-off was seized pursuant to the warrant; the top layer of steel was removed; and the copper was weighed. The roll-off was found to contain approximately 26,000 pounds of copper. J.A. 335.

A federal grand jury subsequently returned an indictment against Lincoln, Leroy, and a third defendant, William Henry, who was a GE employee. Count one charged that the defendants had violated 18 U.S.C. § 371 by conspiring to transport stolen property in interstate commence, in violation of 18 U.S.C. § 2314. Counts two through eight charged substantive violations of 18 U.S.C. § 2314.

After indictment, all three defendants moved to suppress the fruits

of the search and seizure of the roll-off. The argued that the warrant was invalid because it was based on prior warrantless searches that violated the Fourth Amendment. After a hearing, the district court denied the motions to suppress. The district court did not make any findings of fact. The court merely wrote:

> Defendant Howard C. Lincoln's Motion to Suppress Evidence, joined in by other defendants, is DENIED. See Illinois v. Gates, 462 U.S. 213 (1983); Minnesota v. Olsen, 110 S.Ct. 1684 (1990); Katz v. United States, 389 U.S. 347 (1967); United States v. Dunn, 480 U.S. 294 (1987), and Murray v. United States, 487 U.S. 533 (1988).

The defendants were tried before a jury. At the conclusion of its case-in-chief, the court granted Henry's motion for judgment of acquittal on all charges, and the government agreed to

the dismissal of three of the substantive counts with respect to the other defendants. The jury subsequently found Lincoln and Leroy guilty on the conspiracy count but not guilty of the remaining substantive offenses.

II.

The defendants contend that the district court erred in denying their motions to suppress. The government argues, however, that the motions were properly denied for three independent reasons: first, because the defendants did not have a legitimate expectation of privacy in the contents of the roll-off; second, because the seizure was proper under the plain view doctrine; and third, because the seizure was proper pursuant to the independent source doctrine.

A. We turn first to the independent source doctrine. In United States v. Murray, 487 U.S. at 542, the Supreme Court summarized this doctrine as follows:

> The ultimate question, therefore, is whether the search pursuant to warrant was in fact as genuinely independent source of the . . . tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial [unlawful] entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

We have subsequently rephrased this test into the following two questions (United States v. Herrold, 962 F.2d 1131, 1144 (3d Cir. 1992)):

> (1) [W]hether a neutral justice would have issued the search warrant even if not presented with information that had been obtained during an unlawful search and (2) whether the first [unlawful] search prompted the officers to obtain the search warrant. If the answers to

> these questions are yes and no respectively . . . then the evidence seized during the warranted search, even if already discovered in the original entry, is admissible.

In this case, we believe that the first prong of this test was satisfied. Fuchs was not a state actor and had not made any contact with state actors when he carried out his search. Thus, his search did not violate the Fourth Amendment. See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614 (1989); Burdeau v. McDowell, 256 U.S. 465, 475 (1921). Assuming without deciding that the Watts, Middendorf, and Seyboldt searches were all unconstitutional, the taint of those searches would extend only to the brief paragraph in the affidavit describing the information provided by Seyboldt. The remainder of the

information came from Fuchs and was based entirely on his knowledge and observations prior to his phone call to Holmwood. Fuchs himself obtained no new information to convey to the police from his presence at the Watts search.

When read with the Seyboldt paragraph excised, the affidavit contains more than enough probable cause to justify the warrant. Before contacting the authorities, Fuchs knew that the roll-off he had transported was supposed to have contained silicon steel, that it in fact contained a great deal of copper, that the copper had been placed in the roll-off in such a way as to conceal it from view, that he had been told to treat the load differently from other loads he had taken from GE to the Chestner Yard, and that other employees at the Yard were aware of the unexpected

content of the roll-off. The magistrate was supplied in the affidavit with all of this information. These facts would more than justify a reasonable person in suspecting that crime, rather than mere mistake or inadvertence, was the more probable explanation for the presence of the copper in the roll-off. Furthermore, while Sergeant Middendorf's affidavit did not tell the magistrate everything Middendorf knew about the roll-off (in that it omitted any mention of the Watts and Middendorf searches), the affidavit did not in any way mislead the magistrate by failing to disclose information tending to undermine or contradict the information provided. Rather, it failed to disclose accurate information (albeit obtained by warrantless search and seizure) confirming in all respects the

information provided.

While we are satisfied that the first prong of the Murray-Herrold test is met, we cannot, without a factual finding by the district court, determine whether the second prong was also met. In Murray, 487 U.S. at 543, the Supreme Court emphasized the importance of obtaining a factual finding by the district court on the question whether the decision to seek the warrant was prompted by what had been seen during an earlier, unlawful entry. Accordingly, in the present case, the district court should make a specific finding on this question.

B. As noted, the government also contends that the search and seizure were justified under the plain view doctrine. As the Supreme Court observed in Horton v. California, 496 U.S. 128,

136 (1990), "[I]t is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." Furthermore, in Arizona v. Hicks, 480 U.S. 321, 325 (1987), where an officer who lacked probable cause to believe that a stereo was stolen moved the stereo to inspect the serial numbers, the Court held that the search for the serial number could not be justified under the plain view doctrine.

In the present case, in order to apply the plain view doctrine, it is important to know (a) where each of the searching officers stood or was perched when he peered into the roll-off and (b) whether the copper that these officers

saw and took was visible without moving the upper layer of metal in the roll-off. We have examined the pertinent portions of the record, but we do not find them to be entirely clear. Accordingly, if the district court finds it necessary on remand to decide whether the plain view doctrine applies, the court should make findings on these questions.

C. Finally, the government contends that the search and seizure did not violate the defendants' legitimate expectations of privacy. Resolution of this issue would also be aided by findings of fact.

In order to contest the searches and seizures at issue here, each defendant was required to show that he personally had a legitimate expectation of privacy in the contents of the roll-

off. Rakas v. Illinois, 439 U.S. 128, 130 n.1, 138-40 (1979). The roll-off apparently belonged to Lincoln Metal rather than the individual defendants, and corporate officers and employees do not necessarily have a legitimate expectation of privacy in all corporate premises and property. See, e.g., United States v. Mohney, 949 F.2d 1397, 1405 (6th Cir. 1991); United States v. Chuang, 897 F.2d 646, 649-50 (2d Cir. 1990); United States v. Judd, 889 F.2d 1410, 1413 (5th Cir. 1989). Thus, if the district court on remand finds it necessary to decide whether the defendants had legitimate expectations of privacy in the contents of the roll-off, the court should make findings bearing on each defendant's personal relationship to the roll-off and the degree to which others had legitimate

access to the roll-off.[3]

III.

The defendants next argue that their alleged conduct in conspiring to transport stolen property in interstate commerce did not violate 18 U.S.C. § 371, which prohibits, inter alia, conspiracies "to commit any offense against the United States." The defendants maintain that this language refers to only those conspiracies in which the United States is the targeted victim in some concrete sense. Here, the United States was not the targeted victim of the defendants' crime in this sense; the targeted victim was GE.

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[3] The court should also determine whether the roll-off was located on corporate property, a fact that is relevant although not necessarily dispositive.

The defendants rely on United States v. Hope, 861 F.2d 1574 (11th Cir. 1988), which read Tanner v. United States, 483 U.S. 107 (1987), to require this narrow reading of 18 U.S.C. § 371. Hope, however, is no longer good law. Three weeks after Lincoln and Leroy filed their brief in this case, the Eleventh Circuit en banc overruled Hope. United States v. Falcone, 960 F.2d 988 (11th Cir. 1992) (en banc). Adopting Chief Judge Tjoflat's reasoning in his special concurrence at the panel stage (United States v. Falcone, 934 F.2d 1528, 1548 (11th Cir. 1991) (Tjoflat, C.J., specially concurring)), the en banc court held that a conspiracy to violate any federal criminal statute is a conspiracy to "commit [an] offense against the United States." We agree.

At common law, all felony

indictments averred that the defendant had acted against the peace and dignity of the king, as well as against the particular subject of the king who was the direct victim of the crime. As Blackstone wrote (4 Commentaries at 2):

> [T]he king, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence.

For the reasons explained in Chief Judge Tjoflat's opinion (934 F.2d at 1548), we are convinced that 18 U.S.C. § 371 adopted the same usage and that 18 U.S.C. § 371 consequently applies to all conspiracies to violate the laws of the United States.

IV.

Each defendant's presentence report (paragraph 26 in both cases) recommended an eight-level increase in offense level[4] under U.S.S.G. § 2B1.2(b)(1) "since the value of the stolen property

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[4] Without that increase, both defendants' offense levels would be six, with a sentencing range, given their criminal history category, of 0-6 months, rather than the 15-21 months that was actually calculated. The base level for the offense which was the object of the conspiracy, interstate transportation of stolen property, is 4. U.S.S.G. § 2B1.2(a). Both defendants received a 2-point upward enhancement based on a finding that the offense involved more than minimal planning. Id. at (b) (4) (B). They do not contest this adjustment. Furthermore, while U.S.S.G. § 2X1.1(b) (2) provides: "If a conspiracy, decrease by 3 levels unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control," neither defendant has argued that he is entitled to this 3-level reduction.

was more than $100,001 but less than $200,000."[5] Lincoln objected to this recommendation because "[t]he offense level cannot be increased for the conduct contained in the substantive counts on which the Defendant was acquitted." J.A. 41. Leroy made an identically phrased objection. J.A. 59.[6] After noting the defendants' objections and their basis, the trial judge nonetheless accepted the

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[5] Effective subsequent to most of the acts charged as part of the defendants' conspiracy, the Guidelines were amended so that the eight-level increase is now used for losses greater than $70,000 but no greater than $120,000. U.S.S.G. § 2B1.1, incorporated by reference in §2B1.2.

[6] The defendants also made objections which have not been pursued on appeal relating to the judge's calculation of the appropriate price per pound of the stolen copper and the number of pounds involved.

recommendation of the presentence report, observing that the burden of proof in sentencing proceedings is lower than in the criminal trial itself.[7] Jan. 28, 1992 Tr. at 5-11; Jan. 30, 1992 Tr. at 5.

We agree with the district court's general analysis. While the elements of a criminal offense itself must be proven beyond a reasonable doubt, the predicate facts for a decision to adjust a defendant's offense level up or down under the Sentencing Guidelines need only be proven by the preponderance of the evidence. United States v. McDowell, 888 F.2d 285, 290-91 (3d Cir. 1989). An acquittal represents the

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[7] The judge also cited United States v. Isom, 886 F.2d 736 (4th Cir. 1989) and United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989). Jan. 30, 1992 Tr. at 5.

jury's conclusion that the elements of the offense have not been proven beyond a reasonable doubt. That conclusion is not inconsistent with a conclusion by the sentencing judge that the same facts have been proven by preponderance of the evidence. In United States v. Ryan, 866 F.2d 604, 609 (3d Cir. 1989), we wrote:

> Before the guidelines were promulgated, a court was permitted to consider evidence on counts of which a defendant was acquitted in sentencing the defendant. Despite [appellant's] claims of error, the guidelines, as we read them, indicate that the Commission intended to permit sentencing courts to continue to consider such information in determining whether to depart from the applicable guideline.

Ryan involved the facts which could be used to justify departure upward from the Guidelines offense level sentencing range, not the facts which can be used to determine the proper Guidelines

offense level in the first place. We do not, however, think that this distinction makes a difference.

Ryan also did not involve an explicit constitutional challenge. The defendants here argue that "[c]onsidering acquitted conduct as relevant conduct violated the Defendants' Fifth Amendment protections against double jeopardy, their right to due process of law and denied them their Sixth Amendment right to have their guilt determined by a jury." Appellants' br. at 40-41. We reject these arguments.[8]

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[8] Defendants cite United States v. Brady, 928 F.2d 844 (9th Cir. 1991), and United States v. Clark, 792 F. Supp. 637 (E.D. Ark. 1992), in support of their constitutional claims. Brady is of extremely limited persuasive value in this circuit, insofar as it rejects our own previous analysis in Ryan. 928 F.2d at 851. Furthermore, Brady has subsequently been explicitly rejected by many other circuits. United States v. Masters, 978 F.2d 281, 286 (7th Cir.

The defendants' double jeopardy argument is fallacious because their sentences were imposed as punishment for the offense for which they were convicted, not for the offenses for which they were acquitted. The defendants were convicted by a jury of the conspiracy count and the conspiracy statute, 18 U.S.C. § 371, authorized sentences of imprisonment of not more than five years. The defendants' 15 month sentences are thus well under the maximum provided by the statute. Reliance on the fact of an earlier

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1992); United States v. Boney, 977 F.2d 624, 635-36 (D.C. Cir. 1992); United States v. Olderbak, 961 F.2d 756, 764-65 (8th Cir. 1992); United States v. Coleman, 947 F.2d 1424, 1429 (10th Cir. 1991). To the extent Clark was not inconsistent with Olderbak, it was fatally undermined by the Eighth Circuit's later decision in United States v. Galloway, 976 F.2d 414 (8th Cir. 1992) (en banc).

conviction in calculating a higher sentence for a current conviction, as the Guidelines do systematically by their use of criminal history categorization, does not violate defendants' double jeopardy right not to be "punished twice" for the first offense. They are not being punished twice for the first offense; they are being punished more severely for the second offense. The same logic applies to the double jeopardy claim here.

The defendants' Sixth Amendment argument lacks merit since it is established that the right to a jury trial does not apply to sentencing. See, e.g., Hildwin v. Florida, 490 U.S. 638 (1989).

Finally, although the defendants baldly assert that their due process rights were violated, they do not

explain the precise basis for this argument. If this argument differs from their double jeopardy and jury trial arguments, the defendants must be arguing that the Due Process Clause requires that sentencing facts be proven beyond a reasonable doubt. This argument is inconsistent with settled precedent. See, e.g., Williams v. New York, 337 U.S. 241 (1949); United States v. McDowell, 888 F.2d at 290-91. We therefore reject it.

V.

In the sentencing proceedings, each defendant requested a two-point reduction in his adjusted offense level for acceptance of responsibility, as provided in U.S.S.G.. § 3E1.1(a). At the time the defendants were sentenced, this subsection read: "If the defendant

clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels."[9]

The defendants pled not guilty and went to trial. However, they chose not to testify, and neither defendant put on a case of his own. After the conclusion of the prosecution's case-in-chief, which had been interspersed with

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[9] "Ordinarily, we must apply the Guidelines in effect at the time of sentencing. However, where the Guidelines have been amended subsequent to the commission of the crime so as to increase a defendant's base offense level, ex post facto concerns require us to apply the earlier Guidelines." United States v. Shirk, 981 F.2d 1382, 1395 (3d Cir. 1992) (citations omitted), as amended, Feb. 16, 1993. Subsection 3E1.1(a) was amended subsequent to the commission of the crime, but not until after defendants were sentenced. Effective as of November 1, 1992, it reads: "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels."

substantial cross-examination of the prosecution's witnesses by defense counsel, both defendants elected to rest and to argue to the jury that the prosecution had not met its burden of proof. After the guilty verdicts, but before sentencing, presentence reports were prepared for each defendant. Those reports accurately stated that, as of the date the reports were prepared, neither defendant had made any statement purporting to accept responsibility. Subsequently, each defendant gave the court an identical written statement, which read:

> It is my intention to appeal my conviction on Count 1. Accordingly, on the advice of counsel, I invoke my rights under the Fifth Amendment to the United States Constitution not to make a factual statement concerning the offense of conviction or related conduct because such a statement might be used to incriminate me should this conviction be

overturned on appeal.

> My inability, at this time, to make a factual statement demonstrating my acceptance of responsibility is not intended to convey any disrespect for the Court or the legal process. I recognize that the jury's verdict of guilty on Count 1 subjects me to possible imprisonment and/or fines by the Court and I am prepared to accept responsibility for my conduct as the jury found it to be.
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> In the legal posture in which my case presently stands, I cannot say more without waiving my constitutional rights and I ask the Court, not to punish me for asserting my constitutional rights, and to grant me credit for acceptance for [sic] responsibility under the Federal Sentencing Guidelines.

The district court in effect held that this statement, standing alone, was inadequate proof of acceptance of responsibility and that denial of the two-level reduction did not violate the defendants' Fifth Amendment rights. Defendants appeal this ruling. They rely primarily on our decision in United

States v. Frierson, 945 F.2d 650 (3d Cir. 1991), cert. denied, 112 S. Ct. 1515 (1992). In Frierson, we held that "a denied (Section 3E1.1) reduction in sentence is a penalty in the context of Fifth Amendment jurisprudence" (id. at 660), and that it would be unconstitutional to deny a Section 3E1.1 reduction "because of an exercise of the Fifth Amendment privilege, [or] because of any statements compelled pursuant to a threat against exercise of the privilege" (id. at 664).

We read Frierson to hold that if a defendant asserts his Fifth Amendment right during a sentencing hearing and refuses to discuss conduct for which he has not pled guilty, the court may not weigh that assertion against the defendant. Nevertheless, as Frierson recognized, albeit in dicta:

> In a case where the defendant has consistently asserted the privilege . . . a sentencing judge confronting an acceptance of responsibility issue obviously must not draw any inference from the fact that the privilege has been claimed. . . . [T]he judge cannot rely on the defendant's failure to admit to such acts as a basis for denying the two-level reduction. But that in no way implies an automatic two-level reduction for such a defendant. The sentencing judge must address the acceptance of responsibility issue on the basis of all of the record evidence relevant to that issue. One probative fact will be whether the defendant has admitted the conduct constituting the offense of conviction. But the record may contain other helpful facts as well. Application Note 1 to § 3E1.1 lists . . . factors other than admissions by the defendant to consider in determining acceptance of responsibility; and that list is not exhaustive.

Id. at 663 (emphasis added).

We note that Frierson expressly declined to decide "whether a convicted defendant who exercised his privilege at trial has a Fifth Amendment right not to discuss his offense pending direct

appeal." Id. at 662 n.7 (emphasis omitted). We also need not decide that issue. Regardless of whether defendants had such a Fifth Amendment right, the sentencing judge was required to determine the acceptance of responsibility issue "on the basis of all of the record evidence relevant to [acceptance of responsibility]." Id. at 663. In this case the only relevant record evidence was the defendants' bald assertion that they were "prepared to accept responsibility for [their) conduct as the jury found it to be."

We hold that these words do not clearly and unequivocally demonstrate an acceptance of responsibility under Section 3E1.1. We say this because the Sentencing Guidelines contemplate an acceptance of responsibility that is both affirmative and in the present

tense. Relevant evidence is not limited to whether the defendant has made an admission of factual guilt. Rather, it may include facts showing the existence of other factors as set forth in the Application Notes to Section 3E1.1.[10] Such were not tendered here. This requirement does not compel a defendant to incriminate himself. What it does do is limit the availability of the reduction to those who have clearly made

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[10] Examples of other factors that should be considered are: (1) "voluntary termination or withdrawal from criminal conduct or associations"; (2) "voluntary payment of restitution prior to adjudication of guilt"; (3) "voluntary surrender to authorities promptly after commission of the offense"; (4) "voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense"; (5) "voluntary resignation from the office or position held during the commission of the offense"; and (6) "the timeliness of the defendant's conduct in manifesting the acceptance of responsibility." U.S.S.G. § 3E1.1, comment. (n.1).

the requisite showing.

If we accepted the defendants' argument and held that they were entitled to a two-level reduction under Section 3E1.1, then virtually every defendant who was tried and convicted could easily obtain a similar reduction. Virtually every such defendant could submit a statement similar to those submitted here. As a result, Section 3E1.1 would be rendered essentially meaningless. Most defendants who went to trial and vigorously contested their guilt would be eligible to receive the same relief under Section 3E1.1 as those who pled guilty. We are convinced that this is not what the Commission intended. Nor do we believe that the Constitution requires such results. See Corbitt v. New Jersey, 439 U.S. 212, 218-19 (1978); Bordenkircher v. Hayes,

434 U.S. 357, 364 (1978); Brady v. United States, 397 U.S. 742, 751 (1970).

VI.

In conclusion, we vacate the judgments and remand this case for further proceedings regarding the defendants' suppression motions.[11] We reject the defendants' remaining arguments.

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[11] If the district court concludes, after making the necessary findings, that the suppression motions were properly denied, the judgments previously entered may be reinstated. On the other hand, if the court concludes that those motions should have been granted in whole or part, the court should determine whether the admission of the evidence that should have been suppressed requires the granting of a new trial.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

Circuit Judge